

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAY 28 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0262
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RALPH THOMAS JESSUP,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20084272

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Ralph Jessup was convicted of two counts of armed robbery, one count of aggravated robbery, four counts of aggravated assault with a

deadly weapon, four counts of kidnapping, and one count of theft of a means of transportation. The trial court sentenced him to concurrent prison terms, the longest of which were twenty-one years. On appeal, Jessup claims the trial court erred in precluding him from questioning a victim about several issues. For the following reasons, we affirm.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the convictions.” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In late 2008, D.H. and M.D. were in their home¹ when several people, including Jessup, kicked open the back door and ordered the couple to the ground. Jessup and his accomplices subsequently tied up D.H. and M.D. and covered their heads with jackets and blankets. The invaders then demanded drugs and anything of value and ransacked the home. Jessup and his companions eventually left in a van that belonged to D.H. and M.D.

¶3 D.H. freed himself and called police, who found the van parked in Jessup’s back yard. During a search of Jessup’s home and garage, officers found numerous items that had been taken from D.H. and M.D., as well as tools used during the home invasion. Jessup was arrested and charged with numerous felonies. He was ultimately convicted of most of the charges against him, and this appeal followed.

¹The couple’s granddaughter, J., was also in the home at the time of invasion, and M.D.’s son, D., and his friend, G., arrived at the home while it was being ransacked.

Evidence of Drug Activity

¶4 Jessup first states the trial court erred by precluding him from asking M.D. about her alleged drug activity.² But because M.D.'s attorneys confirmed she would assert her Fifth Amendment privilege against self-incrimination in response to this line of questioning and because the court precluded the questions to avoid making her do so before the jury, the essence of Jessup's argument is that the court should have required M.D. to invoke this privilege in front of the jury.³ We review for an abuse of discretion a trial court's decision to exclude the testimony of a witness who asserts her Fifth Amendment privilege against self-incrimination. *State v. Harrod*, 218 Ariz. 268, ¶ 19, 183 P.3d 519, 526 (2008).

²Jessup mixes different issues in one argument, making it difficult to appreciate each issue individually. And, although he mentions the trial court's preclusion of evidence of M.D.'s pending criminal charges, he does not challenge the court's ruling that evidence of these charges was inadmissible to impeach M.D. under Rule 609, Ariz. R. Evid., because of the presumption of innocence, nor does he provide any citation to authority that would contradict this ruling. Thus, his argument is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review). Additionally, Jessup did not raise any constitutional challenges below, so he has forfeited the right to seek relief on those issues for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in waiver of review for all but fundamental error). Because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

³Jessup's citation of Rule 404(b), Ariz. R. Evid., is irrelevant to this issue. None of the cases cited involved the invocation of the witness's Fifth Amendment right to avoid self-incrimination. *See United States v. Cohen*, 888 F.2d 770 (11th Cir. 1989); *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977).

¶5 The Sixth Amendment to the United States Constitution guarantees a defendant the “right to offer the testimony of witnesses’ . . . in order to present a defense.” *Id.* ¶ 20, *quoting Washington v. Texas*, 388 U.S. 14, 19 (1967). “But the right is not absolute,” and a court may refuse to allow testimony of a witness who intends to legitimately invoke the Fifth Amendment. *Id.* ¶¶ 20-21.

¶6 Jessup does not assert that M.D.’s invocation of her Fifth Amendment privilege was improper. Rather, he implies that she should have been required to invoke her rights before the jury. But the case law allows a trial court discretion in deciding how the privilege should be invoked. *See, e.g., id.* ¶ 19. Jessup provides no authority that requires a witness to invoke her Fifth Amendment privilege in the jury’s presence, and we are aware of none. Because M.D. intended to properly assert her privilege, we find no abuse of the court’s discretion in precluding Jessup from questioning M.D. about alleged drug activity.

¶7 Moreover, any error would have been harmless. Jessup contends he wished to question M.D. about drug activity to support his defense that he had been at M.D.’s home before the attacks, rather than during them, to collect on a drug debt. But, instead of exculpating him, that evidence would have provided a motive for the attack of which he was convicted. And the trial court told counsel that Jessup could present his own testimony to that effect, although he never did so. Accordingly, Jessup could still have introduced his theory of the case without requiring M.D. to invoke her Fifth Amendment privilege before the jury. Furthermore, the jury heard testimony that the home had been the site of drug activity, and the state produced overwhelming evidence of Jessup’s guilt.

Evidence of Prescription Medications

¶8 Jessup also argues the trial court erred when it precluded him from “impeaching [M.D.] if she denied taking prescription medications that . . . [had] interfere[d] with her ability to perceive, understand or recollect” the home invasion. But the court did not completely preclude Jessup from impeaching M.D.’s testimony. Rather, it stated that, if M.D. denied taking medication that might have altered her perception on the night of the home invasion, Jessup had “to leave it at that” unless he could present expert testimony to the contrary. Jessup does not contend on appeal that expert testimony should not have been required. Accordingly, any such argument is waived. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review); *see also Howland v. State*, 169 Ariz. 293, 295, 818 P.2d 1169, 1171 (App. 1991) (issues not raised on appeal waived).

Disposition

¶9 For the reasons explained above, we affirm Jessup’s convictions and sentences.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge